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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1379

WALTER HUMPHREY,
DONALD V. MALONE,
ROBERT KALWAT and
MARION A. SACKSTEDER, - - - - Petitioners,

versus

DEALERS TRANSPORT COMPANY and
E & L TRANSPORT COMPANY, - - Respondents.

BRIEF FOR RESPONDENT, E & L TRANSPORT COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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June 10, 1969.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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OPINIONS BELOW.

The opinion of the District Court for the Western District of Kentucky dismissing the Complaint is not reported, but is reprinted as App. B, pp. 7a-14a, of the Petitioners' Brief. The Court of Appeals for the Sixth Circuit affirmed the District Court for the reasons set forth in the District Court's findings of fact and conclusion of law. The order of the Sixth Circuit Court of Appeals is unreported and is printed in the Petitioners' Brief as App. C, p. 15a.

JURISDICTION.

The Petitioners have invoked the authority of this Court to review cases in the Courts of Appeal under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

The petition lists two questions for review (Pet. 2). Stated summarily they are:

1. Is an employee in a Section 301 action required to show that his injury resulted from the breach?

2. Is non-performance of contractual obligations excused when performance is enjoined by a Court Order?

STATUTES INVOLVED.

§ 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 reads in pertinent part as follows:

> Section 301(a) "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (61 Stat. 156; 29 U.S.C. § 185)

COUNTER-STATEMENT OF THE CASE.

Petitioners' statement of the facts omits or slants the facts relevant to this litigation, thus requiring this counter-statement of the case. The petitioner Humphrey and the class of petitioners here were the defendants in the litigation that reached this Court and culminated in the decision in *Humphrey* v. *Moore,* 375 U. S. 335 (1964). In that litigation these petitioners were the successful parties. Following upon that litigation they brought the instant litigation. This Court fully summarized the facts in its Opinion in *Humphrey* v. *Moore, supra,* and since these petitioners are bound by that determination, we set them out here:

> "Part of the business of each of these companies was the transportation of new automobiles from the assembly plant of the Ford Motor Company in Louisville, Kentucky. In the face of declining business resulting from several factors, the two companies were informed by Ford that there was room for only one of them in the Louisville operation. After considering the matter for some time, the two companies made these arrangements: E & L would sell to Dealers its 'secondary' authority out of Louisville, the purchase price to be a nominal sum roughly equal to the cost of effecting the transfer of authority; E & L would also sell to Dealers its authority to serve certain points in Mississippi and Louisiana; and Dealers would sell to E & L its initial authority out of Lorain, Ohio, along with certain equipment and terminal facilities. The purpose of these arrangements was to concentrate the transportation activities of E & L in the more northerly area and

those of Dealers in the southern zone. The transfers were subject to the approval of regulatory agencies.

"The employees of both Dealers and E & L were represented by the same union, General Drivers, Warehousemen and Helpers, Local Union No. 89. Its president, Paul Priddy, as the result of inquiry from E & L by his assistant, understood that the transaction between the companies involved no trades, sales, or exchanges of properties but only a withdrawal by E & L at the direction of the Ford Motor Company. He consequently advised the E & L employees that their situation was precarious. When layoffs at E & L began three E & L employees filed grievances claiming that the seniority lists of Dealers and E & L should be 'sandwiched' and the E & L employees be taken on at Dealers with the seniority they had enjoyed at E & L. The grievances were placed before the local joint committee, Priddy or his assistant meanwhile advised Dealers employees that they had 'nothing to worry about' since E & L employees had no contract right to transfer under these circumstances.

"The collective bargaining contract involved covered a multi-employer, multi-local union unit negotiated on behalf of the employers by Automobile Transporters Labor Division and on behalf of the unions by National Truckaway and Driveaway Conference. Almost identical contracts were executed by each company in the unit and by the appropriate local union. According to Art. 4, § 1 of the contract 'seniority rights for employees shall prevail' and 'any controversy over the employees' standing on such lists shall be submitted

to the joint grievance procedure. . . .' Section 5 of the same article, of central significance here, was as follows:

"'In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure.'

"Article 7 called for grievances to be first taken up between the employer and the local union and, if not settled, to be submitted to the local joint committee where the union and the employer were to have equal votes. Failing settlement by majority vote of the members of the local committee, the matter could be taken to the Automobile Transporters Joint Conference Committee upon which the employers and the unions in the overall bargaining unit had an equal number of representatives. Decisions of the Joint Conference Committee were to be 'final and conclusive and binding upon the employer and the union, and the employees involved.' However, if the Joint Conference Committee was unable to reach a decision the matter was to be submitted to arbitration as provided in the contract.

"Article 7 also provided that:

"(d) 'It is agreed that all matters pertaining to the interpretation of any provision of this Agreement, whether requested by the Employer or the Union, must be submitted to the full Committee of the Automobile Transporters Joint Confer-

ence Committee, which Committee, after listening to testimony on both sides, shall make a decision.'

"Other provisions of the contract stated that it was 'the intention of the parties to resolve all questions of interpretation by mutual agreement' and that the employer agreed 'to be bound by all of the terms and provisions of this Agreement, and also agrees to be bound by the interpretations and enforcement of the Agreement.'

"The grievances of the E & L employees were submitted directly to the local joint committee and endorsed 'Deadlocked to Detroit for interpretation' over the signatures of the local union president and the Dealers representative on the committee. Later, however, the local union, having been more fully advised as to the nature of the transaction between the two companies, decided to recommend to the Joint Conference Committee that the seniority lists of the two companies be dovetailed and the E & L employees be employed at Dealers with seniority rights based upon those which they had enjoyed at E & L. The three shop stewards who represented the Dealers employees before the Joint Conference Committee meeting in Detroit were so advised by the union immediately prior to the opening of the hearing. After hearing from the company, the union and the stewards representing Dealers employees, the Joint Conference Committee thereupon determined that 'in accordance with Article 4 and particularly subsections 4 and 5' of the agreement the employees of E & L and of Dealers should 'be sandwiched in on master seniority boards using the presently constituted seniority lists and the dates contained therein. . . .'

"Since E & L was an older company and most of its employees had more seniority than the Dealers employees, the decision entailed the layoff of a large number of Dealers employees to provide openings for the E & L drivers.

"Respondent, Moore, on behalf of himself and other Dealers employees, then brought this class action in a Kentucky state court praying for an injunction against the union and the company to prevent the decision of the Joint Conference Committee from being carried out. Damages were asked in an alternative count and certain E & L employees were added as defendants by amendment to the complaint. The complaint alleged that Dealers employees had relied upon the union to represent them, that the president of Local 89, Paul Priddy, assured Dealers employees that they had nothing to worry about and that precedent in the industry provided that when a new business is taken over, its employees do not displace the original employees of the acquiring company; it further alleged that Priddy had deliberately 'deadlocked' the local joint committee and that the Dealers employees learned for the first time before the Joint Conference Committee in Detroit, that Priddy favored dovetailing the seniority lists. Priddy's actions, the complaint went on, 'in deceiving these plaintiffs as to his position left them without representation before the Joint Conference Committee.' The decision, according to the complaint, was 'contrived, planned and brought about by Paul Priddy' who 'has deceived and failed completely to represent said employees' and whose 'false and deceitful action' and 'connivance . . . with the employees of E & L' threatened the

jobs of Dealers employees. The International union is said to have 'conspired with and assisted the defendant, Local No. 89, and its president, Paul Priddy, in bringing about this result. . . .' The decision of the Joint Conference Committee was charged to be arbitrary and capricious, contrary to the existing practice in the industry and violative of the collective bargaining contract.

"After hearing, the trial court denied a temporary and permanent injunction. The Court of Appeals of the Commonwealth of Kentucky reversed and granted a permanent injunction, two judges dissenting. 356 S. W. 2d 241. In the view of that court, Art. 4, § 5 could have no application to the circumstances of this case since it came into play only if the absorbing company agreed to hire the employees of the absorbed company. The clause was said to deal with seniority, not with initial employment. Therefore, it was said, the decision of the Joint Conference Committee was not binding because the question of employing E & L drivers was not 'arbitrable' at all under this section. The Court of Appeals, however, went on to hold that even if it were otherwise, this decision could not stand since the situation involved antagonistic interests of two sets of employees represented by the same union advocate. The result was inadequate representation of the Dealers employees in a context where Dealers itself was essentially neutral. Against such a backdrop, the erroneous decision of the board became 'arbitrary and violative of natural justice.' Kentucky cases were cited and relied upon." (375 U. S. 335 at 336.)

This Court went on to find that there had been an absorption of E & L Transport Company (hereinafter "E & L") by Dealers Transport Company (hereinafter "Dealers"), and ordered the reinstatement of the Automobile Transporters Joint Conference Opinion (hereinafter "Joint Committee"). The court noted that "no fraud is charged against the employer. . . ." (375 U. S. 335 at 343).

Following upon this Court's determination, as set out above, the petitioners brought the instant litigation seeking to recover damages from the respondents. The damages sought were the wages allegedly lost by the petitioners during the period that the Kentucky Court of Appeals' injunction, later reversed by this Court, prevented the respondent Dealers from putting into effect the prior Award of the Joint Conference Committee. The suit, by the same petitioners who were successful in convincing this Court that there was no fraud involved in the Joint Conference Committee hearing, now alleged that Dealers and E & L had misrepresented to their employees the terms of the withdrawal of E & L from Louisville. The specific misrepresentation was alleged to be the fact that there was an absorption rather than some other arrangement. Some three years after the suit was filed, during which all of the parties were given the fullest opportunity to engage in pre-trial discovery and the taking of depositions, the District Court dismissed the complaint holding:

(1) That the Petitioners discovered the alleged fraud in advance of the Joint Committee's hearing in

Detroit and, therefore, were in substance no way misled; and

(2) That the Petitioners in no way relied to their detriment on the statements; and

(3) That any possible adverse effects of the alleged fraud were cured by the full hearing before the Joint Committee in Detroit, whose decision was found to be fair and equitable by the Supreme Court of the United States; and

(4) That it was stretching the imagination that the alleged antecedent fraud of the Respondents caused the litigation, styled *Humphrey* v. *Moore, supra,* resulting in a delay of the implementation of the Joint Committee's findings; and

(5) That E & L was not a party to *Humphrey* v. *Moore, supra* and, therefore, could not be charged with any responsibility or liability for alleged damages resulting from the Kentucky Court of Appeals injunction which was later overturned by the United States Supreme Court; and

(6) That even if the Petitioners' theories of fraud and misrepresentation were deemed actionable, as a matter of law no damages lay for the period of delay during which the injunction of the Court of Appeals was in effect.

From this opinion the Petitioners prosecuted their Appeal to the Sixth Circuit Court of Appeals which summarily affirmed the lower court's opinion. From this decision the Petitioners have petitioned this Court for the granting of a Writ of Certiorari.

ARGUMENT.

I.

The Courts Below Applied Well Established Principles of Contract and Fraud Law to the Facts and the Decisions in No Way Debilitate the Provisions of Section 301.

The Petitioners argue at some length in their Petition that the decisions below emasculate the thrust of Section 301 of the Labor Management Relations Act. This contention, however, will not bear up under close scrutiny because the decision of the United States District Court for the Western District of Kentucky, as affirmed by the United States Court of Appeals for the Sixth Circuit, involves nothing more than the application of well established principles of Contract and Fraud Law to the facts presented.

For example, the Petitioners' Complaint alleges a conspiracy to fraudulently conceal certain facts from the Petitioners. Paragraph 15, Petitioners' Complaint, Respondents' Appendix, page 1(a). They have since modified this statement of their cause of action by arguing here that their cause of action is based upon fraudulent misrepresentations made to the Petitioners by the Respondents. It is, however, a fundamental principle of Fraud Law that to recover in an action for fraud, there must have detrimental reliance on the fraud. The rule is well stated in 37 CJS, *Fraud,* Section 8 at page 215:

> "The gist of an action based on fraud is fraud in defendant and damage to plaintiff; and its basic

elements are false representations by defendant and *reliance thereon by plaintiff to his damage.*" (Emphasis supplied.)

See also *Snyder* v. *Rhinehart,* 274 Ky. 274, 118 S. W. 2d 543 (1938).

Once this rule is recognized it becomes quickly evident that the Petitioners, as the lower courts held, have no cause of action in this case because the undisputed record discloses no reliance on their part. For example, immediately upon being informed that E & L was withdrawing from the Louisville area, Petitioners invoked the grievance procedure *claiming that there was an absorption.* That grievance reads in part as follows:

"On Monday, August 14, 1961, the stewards and committee spokesman for employees of E. & L. Transport of Kentucky were advised, effective August 21, 1961 E. & L. was abolishing their Driveaway Department. The Driveaway business will be *absorbed* by Dealers Transport Company. Article IV, Seniority, Section 4, 5 and 6 of our Agreement establishes an employee's rights in the instances of sales, transfer, lease and assignments of work covered by our Union Contract. It is my desire first to determine if under the circumstances of *absorbing* business and work that has been performed by E. & L. employees detrimentally affected by the abolishment of E. & L. Driveaway Board, further, if E. & L. employees have the right to stay with the business or traffic, should they not carry with them all seniority credits for any purposes accured during the tenture (sic) of their employment at E. & L." (Respondents' Appendix, page 5(a); Emphasis supplied.)

Similarly Petitioners alleged an absorption in their grievance to the Joint Committee. This was clearly contrary to and at variance with the alleged misrepresentations supposedly made to them. The Petitioners stated their grievance to the Joint Conference Committee in part as follows:

> "On Monday, Aug. 14, 1961 the stewards, committeemen and agent, spokesman for the bargaining unit employees of E. & L. Transport of Ky. were advised, effective August 21, 1961 E. & L. was abolishing the Driveaway Dept. of their operations. The Driveaway business will be *absorbed* by Dealers Transport Co., Article IV, Seniority, Section 4, 5, & 6 of our Agreement establishes employees rights in the instances of sales, transfer, lease, & assignments of work covered by our Union contract.
>
> "I am requesting that E. & L. Driveaway Drivers follow or stay with the business *absorbed* by Dealers Transport Co. and be placed on the Dealers Transport seniority list on a dovetailed basis.
>
> "I am also requesting that other E. & L. bargaining unit classifications be similar (sic) treated and that all E. & L. employees be compensated for any financial losses substained while awaiting a decision in this matter." (Respondents' Appendix, page 6(a); Emphasis supplied.)

It is evident, therefore, that at no stage of the proceedings did the Petitioners rely upon the alleged misrepresentations. The absorption contention, thus, was clearly before all the parties from the very onset of

the grievance procedure in Louisville. The Court below recognized that the Petitioners had not relied upon the alleged misrepresentations, and as a result, gave Judgment for the Respondents. Since reliance is an essential element of any fraud action, the decision below is in conformity with universally recognized legal concepts, and the Petition must be denied, if only for this reason.

In the face of this rather elementary proposition, the petitioners have developed another even more unsound theory of recovery. They seek relief here on the theory that but for the alleged misrepresentations (already demonstrated non-existent on the basis of the clear record before all of the Courts) the Dealers' employees would never have brought the *Humphrey* v. *Moore* litigation. The obverse of this is that but for the alleged misrepresentations (demonstrably non-existent) the Dealers' employees would have stood by quietly and allowed their jobs to be eliminated without taking any action to protect their vested interests. Aside from the complete irrationality of such reasoning, the record in *Humphrey* v. *Moore, supra,* completely invalidates these contentions. The very complaint which initiated the latter litigation demonstrated on its face that the grievances complained of in that action were entirely apart from the alleged misrepresentations. In his concurring Opinion in *Humphrey* v. *Moore, supra,* Mr. Justice Goldberg summarized the contentions of the complaint as follows:

> "(1) the Joint Committee exceeded its powers under the existing collective bargaining contract in making its decision dovetailing seniority lists,

and (2) the decision of the Committee was brought about by dishonest union conduct in breach of its duty of fair representation." (375 U. S. 335 at 352.)

As the lower courts readily saw, neither of the stated causes of action is in any way related to the alleged fraudulent misrepresentations. The Dealers employees contended that the Joint Committee exceeded its powers and that the Union breached its duty of fair representation. There is no mention anywhere in the proceedings of *Humphrey* v. *Moore* of any misrepresentations by the Respondents. In fact, this Court held that "no fraud is charged against the employer . . ." (375 U. S. 335 at 343). Thus, the lower court's finding that the alleged misrepresentations in no way caused, directly or indirectly, the litigation known today as *Humphrey* v. *Moore* is completely sustained by the record of *Humphrey* v. *Moore, supra,* and this Court's decision in that case.

Lastly, the Respondents argue here as they did unsuccessfully below, that it is incumbent upon the Respondents to show that the Petitioners suffered no damages as a result of the alleged fraudulent misrepresentations. In support of this novel theory they cite to this court the cases of *The Pennsylvania,* 19 Wall. (86 U. S. 125); *Wirtz* v. *Hotel Employees,* 391 U. S. 492; *NLRB* v. *Remington Rand, Inc.,* 94 F. 2d 862. The Petitioners neglect, however, to point out that in each of the cases fault had been established giving rise to a presumption that the tortfeasor caused the damages. In the instance case, the lower courts held that

even if the misrepresentations were made, they were discovered well in advance of the Joint Committee's hearing in Detroit and that "any possible adverse effects of said fraud could have had were cured by the full hearing that was held at Detroit and whose decision was found by the Supreme Court to be fair and acceptable." Opinion of United States District Court below, Petitioners' Appendix, page 13a. To see that this statement is a correct statement of holding in *Humphrey* v. *Moore, supra,* it is only necessary to refer to this court's opinion in that case.

> "Dealers employees had notice of the hearing, they were obviously aware that they were locked in a struggle for jobs and seniority with the E & L drivers, and three stewards representing them went to the hearing at union expense and were given every opportunity to state their position. Thus the issue is in reality a narrow one. *There was no substantial dispute about the facts concerning the nature of the transaction between the two companies.*" (Emphasis supplied.) .(375 U. S. 335 at 350.)

The Court went on to hold that "the decision of the Committee reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." The prior disclosure before the Joint Committee hearing fully cured any alleged misrepresentations and, therefore, the Petitioners misplace their reliance on the cases cited in their petition. It is clear, therefore, that there is no conflict in the circuits on this point nor are the decisions below contrary to any established principles of law.

II.

Damages Will Not Lie Against Respondent E & L Transport Company for Alleged Failure to Implement the Joint Commitee's Award or to Seek Dissolution of the Kentucky Court of Appeals' Injunction When It Had No Duty of Implementation Under the Award Nor Was It a Party to *Humphrey v. Moore*..

That the above is true is self-evident. The Joint Committee determined that Dealers was absorbing E & L's Louisville operations and that the E & L employment list be merged into the Dealers employment list. This holding entitled certain former E & L employees to be employed at Dealers. E & L and Dealers are separate corporate entities, however, and E & L had neither the power nor the obligation to insure compliance with the Award. As the contract stated, and the Supreme Court held, the Award of the Joint Committee was final and binding on the parties. Once the Award was rendered, the nature of the transaction had been determined, the future employment rights of the E & L employees had been fixed, and at this point E & L's responsibility in the matter ceased.

Nor can responsibility be placed on E & L for what transpired afterwards. As was noted previously in this Brief, the Petitioners neither relied upon nor suffered any damages from the alleged misrepresentations. In any case, the effects of any alleged misrepresentations were cured by full disclosure prior to the Joint Committee's hearing and vitiated by the Joint Committee's favorable ruling. The contention that the Dealers employees brought suit as a result of the

alleged misrepresentations has also been set to rest earlier in this Brief.

Petitioners clearly recognize that E & L had no responsibility in the *Humphrey* v. *Moore* litigation, either to support the Award by taking sides or seeking dissolution of the injunction. Nowhere in their Brief do they attempt to make this argument. Nor do they even seek to involve E & L on this point. E & L was *not* a party to *Humphrey* v *Moore* and had no standing in Court to argue for one side or another. Furthermore, the injunction was not directed at E & L but at Dealers and the Union. It is clear that as Judge Brooks held "E and L Transport Company . . . could not be charged with any negligence or liability for action or inaction in that litigation" (Petitioners' Appendix, page 8a).

The foregoing was self-evident to the Lower Court and is unchallenged in the Petitioners' Brief on this Appeal.

CONCLUSION.

For the foregoing reasons it is clear that the decisions below do not debilitate the provisions of Section 301 of the Labor Management Relations Act, nor violate any established principles of law. As a result, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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